

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7093

To Be Argued By
DAVID N. STEIN

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UNITED STATES COURT OF APPEALS
For the Second Circuit

GLADYS GENTILE,

Plaintiff-Appellant,

-against-

JOHN WALLEN, et al,

Defendants-Appellees.

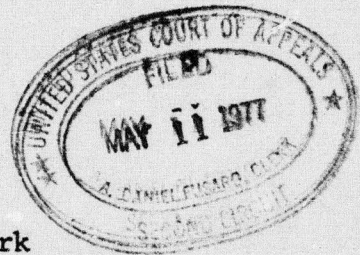
On Appeal from Judgment and Order of the United
States District Court for the Eastern District of
New York

APPELLANT'S BRIEF

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Index No. 76 Civ. 911 Eastern District of New York

STATE STATUTES AND REGULATIONS

New York Education Law §3020-a

New York Education Law §3012, 3013

New York Education Law §3031.

PRELIMINARY STATEMENT

This is an appeal by plaintiff Gladys Gentile from a memorandum and order entered on December 23, 1976, in the United States District Court for the Eastern District of New York (Pratt, D.J.) (445-459)*, which order granted to defendants-appellees summary judgment dismissing all eleven counts of the plaintiff-appellant's complaint and denying plaintiff's motion for a preliminary injunction restoring her to her position as an elementary school teacher with the appellee Board of Education pending a due process hearing.

Appellant brings this appeal as a matter of right from a final Order and Judgment of the United States District Court.

* Unless otherwise indicated, numbers in parenthesis refer to pages in the Appendix.

QUESTIONS PRESENTED

In this action, plaintiff Mrs. Gladys Gentile, an elementary school teacher in a school within the jurisdiction of the defendant Board of Education, sought declaratory, injunctive and monetary relief for violation of her constitutional rights by her termination by defendants without due process of law. Plaintiff predicated jurisdiction on 42 U.S.C. §§1981, 1983 and 1985 via 28 U.S.C. §1343(3)24, the fourteenth amendment to the United States Constitution via 28 U.S.C. 1331(a), and upon 28 U.S.C. §2201. Plaintiff sought preliminary injunctive relief restoring her to her position nunc pro tunc to June 30, 1975, pending a due process hearing on the charges which had been lodged against her. The plaintiff also sought damages for defendants' violation of her constitutional and statutory rights, as well as damages for defendants' tortious acts against her pursuant to the District Court's discretion to exercise pendant jurisdiction.

The complaint alleges that Mrs. Gentile was dismissed by defendants solely because she allegedly colluded with her principal to falsify his observation and evaluation reports of her teaching performance. The complaint, and supporting affidavits and exhibits establish that defendants publicized their alleged reason for terminating plaintiff, and that the

publications stigmatized her both in the general community and the educational community.

Mrs. Gentile claimed, and set forth documentary evidence in support of that claim, that defendants caused her to be "humiliated, embarrassed, subjected to negative public opinion, obloquy, and opprobrium and foreclosed [her] from pursuing her profession" as well as alternate avenues of future employment.

Mrs. Gentile also denied in her complaint and affidavit that the allegations of misconduct lodged against her were untrue.

The following questions are presented:

1. Did defendants violated plaintiff's liberty interest when it terminated her?

Plaintiff will argue in the affirmative.

2. Assuming arguendo that plaintiff was terminated in violation of her liberty interests, was she afforded a sufficient due process hearing?

Plaintiff argue in the negative.

3. Did plaintiff have a property interest in her position?

Plaintiff will argue in the affirmative.

4. Assuming plaintiff had a property interest in her position, was she terminated without due process?

Plaintiff will argue in the affirmative.

STATEMENT OF FACTS

As plaintiff's affidavit, the complaint, and the annexed exhibits all show, plaintiff was employed as a teacher by the defendant District for various periods during the nine years prior to June 30, 1975.

Plaintiff was initially employed in the defendant District in 1962 and received tenure in 1965 (Gentile affidavit, para. 2) (12) Plaintiff continued teaching in the District until June of 1966, at which time she requested a general leave for medical and personal reasons (Gentile affidavit, para. 2). The leave was granted.

In the spring of 1966, plaintiff's supervisor, a principal of the Comsewogue Elementary School, contacted her to request a definite decision regarding her plans for the 1966-67 school year. The alternative offered was to return as a classroom teacher in September or to resign. Plaintiff resigned. (Gentile affidavit, para. 4)

In September 1968, plaintiff was again employed by the defendant District as a Kindergarten teacher (Gentile affidavit para. 5). She continued to teach in the District until June 1970. In July 1970, plaintiff requested a maternity leave for the 1970-71 school year because she was adopting a baby. She was never informed of whether her application was accepted or denied. (Gentile affidavit, para. 7). (13)

In June 1972, the District offered plaintiff a position at the Comseque Elementary School at a salary step commensurate with her service in the District (Gentile affidavit, para. 9)(14). Plaintiff rejoined the District staff in September 1972.

On March 20, 1975, plaintiff's principal, a Mr. Johnson, observed a math lesson taught by plaintiff. After the observation, he asked plaintiff to report to his office for a post-observation conference that afternoon. (Gentile affidavit, para. 10)(14).

At that time, plaintiff and Johnson discussed the observation. Johnson told plaintiff that his recommendation regarding plaintiff's appointment to tenure was due in defendant Wallen's office the following morning. (Gentile affidavit, para. 10)(14).

Johnson told plaintiff he would make a strong positive recommendation and that he felt it was almost certain that she would receive tenure (Gentile affidavit, para. 10).

Johnson told plaintiff that upon checking the files, he found it necessary to have three of her observations re-typed as they were "sloppy." She read each one and found the contents accurate. Johnson was anxious that plaintiff execute the observations and, under this pressure, she did so. Plaintiff had no independent record of the observations and had no reason to suspect the forms to be inaccurate in any way, since they

had been prepared by her principal. (Gentile affidavit, para. 11) (14).

The following day, plaintiff received a message from defendant Wallen, the District Principal, to telephone him. He told her there was a very serious problem concerning her appointment to tenure and arranged a meeting with plaintiff for late that afternoon (Gentile affidavit, paragraph 12) (15).

Plaintiff met with Wallen. Wallen claimed that the date on the observation forms were incorrect. He implied that plaintiff had colluded with Johnson, the principal, to falsify observations. Plaintiff denied any wrongdoing and insisted that the observations had, in fact, occurred and that the empirical contents thereof were accurate (Gentile affidavit, paragraphs 12-18) (15-19).

Wallen said: "This looks to me like collusion, a conspiracy to defraud the district." He asked plaintiff: "How would this look on your record" if she applied for a position elsewhere. He said, "Did you know that becoming a party to defraud is a criminal offense?" (Gentile affidavit, paragraph 20) (20).

At Wallen's suggestion, plaintiff had a further meeting with him on March 24 (Gentile affidavit paragraph 23) (21).

Wallen reiterated that this series of incidents would preclude plaintiff from obtaining employment elsewhere (Gentile affidavit, paragraph 28) (22). He stated that he had consulted with counsel, the Superintendent, and would communicate with the defendant Board of Education about this

matter (Gentile affidavit, para. 28)(22). Wallen again attached plaintiff's integrity and accused her and others of engaging in a big cover-up (Gentile affidavit, para. 33)(24). Plaintiff again denied defendant Wallen's unsupported allegations against her (Gentile affidavit, para. 34)(24).

On April 3, 1975, plaintiff received a memorandum from Wallen informing her that he would not recommend her for appointment to tenure (Gentile affidavit, para. 35)(24).

The District preferred charges against Johnson on April 16, alleging, inter alia, that he had conspired with plaintiff to prepare fraudulent observations (Gentile affidavit, para. 37)(25).

On May 15, 1975, plaintiff met with defendant Hines to protest her innocence of the allegations made by Wallen against her (Gentile affidavit, paragraph 42)(27). She explained her frustration and confusion regarding the sequence of events and that if she were terminated her career in education would be destroyed (Gentile affidavit, para. 43)(28).

Hines stated that the letter of stated reasons for denial of recommendation for tenure from Wallen was serious in nature and that Wallen must have had good reasons for feeling the way he did (Gentile affidavit, para. 44)(29).

During late March or early April, 1975, defendant Weinerman, a member of the Board of Education, spoke with plaintiff on two occasions (Gentile affidavit, paras. 46 and 47)(30). See also Gentile affidavit, para. 51)(31). In the second conversation,

he indicated that the defendant Wallen had reported that plaintiff had deliberately signed undated observations (Gentile affidavit, para. 47) (30).

On June 3, plaintiff received a letter of dismissal from defendant Hines (Gentile affidavit, para. 48) (30). On June 4, plaintiff sent a letter of request of stated reasons to defendant Hines and received a letter from defendant citing reasons for the dismissal on June 12 (Gentile affidavit, para. 49) (31). Plaintiff submitted a reply on June 26 (Gentile affidavit, para. 49) (31).

On July 21, 1975, the defendant Board of Education voted unanimously to deny plaintiff's appointment to tenure and thus, in effect, denied plaintiff tenure (Gentile affidavit, para. 50) (31).

Plaintiff had been subjected to public and private discussion of her termination and the alleged wrongdoing on which it was based (Gentile Affidavit, paragraphs 50, 53, 55, 56, 57, 58, 59, 60, 61) (33-34).

Several newspaper stories have also appeared concerning this incident (Gentile affidavit, paras. 62, 63, 64) (35).

Subsequently, plaintiff applied for unemployment insurance. She was told by the unemployment insurance examiner that the District had been contacted and had verbally claimed plaintiff had been terminated for cause (Gentile affidavit, para. 53) (32).

Plaintiff was initially informed that because of the

District's claim plaintiff could not collect unemployment insurance benefits (Gentile affidavit, para. 53)(32). However, the District never submitted any evidence to substantiate its allegations and plaintiff was able to eventually collect unemployment insurance (Gentile affidavit, paras. 53, 54)(32, 33) See also Gentile Supplemental affidavit, Exhibit A(437).

Plaintiff has consistently applied for numerous teaching positions in other Districts since her termination and has been unable to obtain a new position (Gentile affidavit, para. 66)(36,37) See also Gentile affidavit, Exhibits L1-16 and M1-22, 133-254) Gentile Supplemental affidavit, paras. 9-14)(432, 433)

OPINION BELOW (445-469)

The Court below held that appellant's claim that she was deprived of a liberty interest in her employment was without merit because she was not stigmatized, and because she was afforded adequate due process (453).

The District Court relied upon Bishop v. Wood, 96 S. Ct. 2074 (1976). The Court found that there was no publication by defendants of the reasons for plaintiff's termination except to plaintiff herself, in the context of a disciplinary proceeding against the principal Johnson, in the context of plaintiff's application for unemployment insurance which was not denied her, and in the context to plaintiff's initiating a grievance under

the collective bargaining agreement (454-457). These disclosures, the Court concluded, all fell within the acceptable limits delineated in Bishop, supra.

The District Court also held that the meetings which appellant had with defendants Wallen and Hines afforded her a sufficient due process proceeding in which to challenge the allegations which had been hurled at her (457, 458). Citing Matthews v. Eldridge, 424 U.S. 319 348 (1976).

The Court also rejected appellant's claim that she was a tenured employee. In 1970, Mrs. Gentile had sought a child care leave to adopt a baby. The defendant Board and its members denied her that leave. Had appellant been granted such a leave, she would have been tenured at the time of her dismissal and entitled to a due process hearing pursuant to §3020-a of the Education Law of the State of New York.

Appellant contends that the defendant's denial of that leave deprived her of equal protection of the law and that she was therefore entitled to be accorded tenured status.

Appellant had also argued that certain language in the collective bargaining agreement between defendant Board and the Port Jefferson Station Teachers Association gave her a property interest in her position.

The District Court decided that defendants did not wrongfully deny Mrs. Gentile a maternity leave to care for her adopted child,

and that, at any rate, it was too late to challenge that determination (450, 451).

With respect to appellant's reliance on the provisions of the labor contract, the Court noted that said provision was "declared void in Brookhaven-Comsewogue School District v. Port Jefferson Station Teachers Association, Index No. 75-7027 (Supreme Court, Suffolk County, August 29, 1975) affirmed on December 13, 1976, by the Appellate Division, Second Department (No. 2188E)." (452)

The Court dismissed all appellant's causes of action, including various state causes of action over which appellant had requested the District Court to exert pendent jurisdiction.

POINT I

DEFENDANTS DEPRIVED PLAINTIFF-APPELLANT OF A LIBERTY INTEREST IN HER POSITION WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE UNITED STATES CONSTITUTION.

It is now well settled that a public employee may not be terminated without a due process hearing where the reasons or the events surrounding that termination case a stigma upon him which violates his liberty interest, which is protected by the Fourteenth Amendment to the United States Constitution. Board of Regents v. Roth, 408 U.S. 564 (1971); Perry v. Sinderman, 408 U.S. 593 (1972); Lombard v. Board of Education, 502 F.2d 631. .

* The Port Jefferson Station Teachers Association has sought leave to appeal that decision to the Court of Appeals of the State of New York.

Plaintiff's affidavit shows that the defendants terminated her because of allegations that she colluded or conspired with the principal of her school to falsify his observations and evaluations of her. Evidence annexed to the affidavit further shows that defendants discussed these allegations against plaintiff with each other, relied upon it in deciding to terminate her, based their termination of her principal Johnson on these accusations, and disseminated these same contentions to the news media and, hence, throughout the community.

Recently, the Court of Appeals in this Circuit held that a probationary policeman who was discharged because his personnel records suggested he had attempted suicide was entitled to a due process hearing "before a dismissal can be effective", Velger v. Cawley, 525 F. 2d 334 (1976), reversed on other grounds, Codd v. Velger, __ U.S. __; 51 L.Ed.2d 92 (1977).

Here defendants have not only discharged Mrs. Gentile on grounds which even some of them admit involve charges of criminal conspiracy, collusion, and professional misconduct, but they have publicized these allegations in the press as well as communicated them to other government agencies, such as the New York State Department of Labor, Division of Employment.

The Court below found that while the allegations which were leveled against Mrs. Gentile might well have stigmatized her,

the defendants did not violate appellant's liberty interest as defined by the Supreme Court in Bishop v. Wood, supra.

The holding in Bishop does not impact the matter at bar, and the District Court's holding that Bishop was fatal to appellant's liberty interest claim was erroneous.

The majority in Bishop stated:

In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation was commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honesty, or integrity" was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after the petitioner suffered the injury for which he seeks redress, it cannot provide retroactive support for his claim. A contrary evaluation of either explanation would penalize forthright and truthful communication between employer and employee, in the former instance, and between litigants in the latter.

The question in this appeal is how broad is the application of Bishop. Appellant will show that the District Court's application of Bishop was overly broad herein, and that by that error the lower Court wrongfully disposed of appellant's claims.

True, Mrs. Gentile's meeting with defendants Wallen and Hines were entirely private, and the stigmatizing attacks made

thereat were not publicized at that time.

It is also accurate, that appellant herself requested the reasons for her discharge. However, there is no proof that appellant herself publicized those reasons which were contained in letters of defendants Hines and Wallen to her. (70, 75) Certainly, §3031 of the Education Law did not require defendants to publicize the reasons for their discharge of Mrs. Gentile. The sole requirement is that defendants Wallen and Himes supply appellant herself with the reasons.

If appellant concedes that the Hines and Wallen letters to her, and the Hines and Wallen meetings with her did not constitute a stigma within the rules set forth in the Bishop case, then exactly what acts on the part of defendants constitute such a stigma and why?

On or about April 16, 1975, defendants preferred charges against the principal Johnson. Johnson had been removed from his position as Principal at plaintiff's school on the previous day, and assigned to other duties (25, 26). The charges, in the main, involved allegations that Johnson had falsely signed Mrs. Gentile's evaluation forms, and, in effect, publicly called attention to the accusations Wallen had made against Mrs. Gentile in private (117-130). With respect to the language in Bishop concerning when this publication occurred, the Court will note it was prior to defendant's termination of appellant.

Johnson's hearing, involving the very same charges which had been levelled at Mrs. Gentile was held on June 12, June 23, and July 9, 1975, again, all prior to defendant's final termination of appellant (260). Johnson, as was his right under law, had elected that these hearings be held in public (260).

The District Court agreed with defendants that because the charges against Johnson and the subsequent hearing all occurred in the context of a legal proceeding, initiated by defendants in good faith, that under Bishop, any stigma accruing to plaintiff therefrom, did not entitle her to a hearing prior to final termination.

Bishop, like Paul v. Davis, 424 U.S. 693 (1976), represents a limitation on the "liberty interest doctrine" promulgated by the Supreme Court in the Roth and Sindermann cases, supra. As such, it must be strictly limited to situations similar to that in Bishop, and should not be applied beyond that scope. Yet, that is clearly what the lower court has done here.

In Bishop, the Supreme Court declined to authorize the intrusion of the Federal Courts into day to day personnel decisions made by government. It noted that the "stigmatizing" statement had been strictly kept private between employer and employee, and was only released at the petitioner's request in the course of litigation initiated by petitioner, in response to interrogatories served by petitioner, and subsequent to peti-

tioner's termination. Furthermore, the petitioner in Bishop alleged no far reaching or permanent damage surviving his termination, as appellant has offered here. Had the Supreme Court agreed with petitioner in Bishop, its conclusion that the United States Courts would have become submerged in a deluge of litigation to review personnel decisions of local and state governments was correct. This controversy, however, is not so common, and appellant does allege substantial infringement of her rights.

While the so-called stigmatizing material in Bishop was released after petitioner's termination and in the course of litigation which he himself commenced and upon his own demand, here the defendants themselves publicized the material by removing Johnson, charging him, and airing the material in a public hearing at which Mrs. Gentile had no right to defend herself or confront her accusers, although her alleged conduct was at issue.

Defendants good faith in intitating and prosecuting charges against Johnson, did not defeat their obligation to afford Mrs. Gentile a hearing as well. Of course, the form of such a hearing is not constitutionally prescirbed, as long as it meets the minimum due process requirements of the constitution.

Nevertheless, had defendants accorded Mrs. Gentile a \$3020-a hearing to which a tenured teacher would be entitled, the allegations against her would have been adjudicated by a

neutral three member advisory panel, subject to final review and determination by many of the defendants themselves. Defendants have not claimed that they would have faced great inconveniences had they given appellant a hearing.

Appellant's cause of action is predicated not on whether defendants actions with respect to terminating Johnson were correct, but rather on defendants failure to accord her the opportunity to refute the serious charges against her before she was terminated.

The Court below also refused to find as an actionable liberty interest defendants disclosure to the State Division of Employment that Mrs. Gentile had been terminated for cause.

More particularly, the defendant School Board's treasurer told the Division appellant was:

discharged for misconduct in connection with [her] employment. Mr. Hubbard of [her] employer [said][she] made misrepresentations on teacher evaluation forms. (437)

The Court below also refused to consider this disclosure a violation of Mrs. Gentile's liberty interests because the Division "is a duly licensed state agency which was charged with obtaining such information... and plaintiff was in no way prejudiced since she subsequently was found eligible for unemployment compensation." (456)

But Bishop does not except a communication from the publication requirement of a liberty interest violation merely

because such a disclosure is made to a state agency. (456) After all, other school districts to which appellant applied or might apply are also agencies of the State charged with obtaining such information in consideration of appellant's fitness for employment. This is the very result the Supreme Court sought to prevent in Roth and Sindermann and about which this Court was disturbed in Velger. The fourteenth amendment protects a public employee from termination without due process where the reasons for his termination are likely to brand him for life. There is nothing in the Bishop decision which excepts disclosures to state agencies from the publication requirement of a viable liberty interest claim, and the District Court in so holding erred. That appellant ultimately received unemployment benefits is of no moment. The damage stemmed from this new communication of the reasons for defendants discharge of plaintiff, and the possibility that those reasons would be more widely disseminated.

Defendants attempted to deny plaintiff access to unemployment insurance by surreptitiously alleging that she had been terminated for misconduct (Gentile supplemental affidavit Exhibit A). Not only was this further publication of the most malicious nature (unsubstantiated oral communication) but it contradicts defendants' claims of maintenance of confidentiality concerning plaintiff's termination. (Defendants' affidavits)

Defendants claim in almost verbatim affidavits submitted

to the Court that they were instructed not to communicate the reasons for appellants dismissal to anyone. This contention is also made in their counsel's affidavit. The instruction was probably given, but whether defendants adhered to it is another story. Certainly, the Court cannot be enlightened by pro forma affidavits submitted by defendants'.

For instance, Mr. Howard stated:

At no time did I disclose any information relating to the Johnson or Gentile matters to the news media, to the public, or anyone else. (426) (Emphasis added)

Well, "anyone else" includes the State Division of Employment. Clearly, these form affidavits are not credible, and should not have been accepted by the Court below on a motion to dismiss.

On April 14, 1975, the plaintiff's Union initiated a grievance pursuant to the collective bargaining agreement between the parties claiming that plaintiff had been given insufficient notice pursuant to Article IV B of the agreement and was therefore, pursuant to the agreement's terms, entitled to tenure.

The grievance remaining unresolved, the Association demanded arbitration. By order to show cause dated May 8, 1975, defendants moved to stay said arbitration.

Section 7503 of the Civil Practice Law and Rules sets forth the limited reasons for granting a stay. In addition,

the Courts have been applying a narrow public policy test which can justify a stay.

Defendants claimed that the laws of the State of New York precluded an arbitrator from awarding tenure to a probationar. Defendants were successful in obtaining a stay of the arbitration on that basis, which said decision was affirmed by the Appellate Division, Second Department and which the association has sought leave to appeal to the Court of Appeals.

Defendants were not required, nor was it an issue in such a proceeding, to publicize the reasons for plaintiff's termination, yet defendants chose to do so.* Thus, the Court in rendering its decision further publicized the superfluous information supplied by defendants.

The Court's inclusion of unnecessary information supplied by defendants resulted in yet still further publication in the newspapers (Gentile affidavit, Exhibit K) (132) and had impact on plaintiff's opportunity to secure further employment in her profession (Gentile supplemental affidavit) (431).

A final and vital factor distinguishes this matter from Bishop. In Bishop, there was no offering that the reasons for petitioner's discharge interfered with his future employment opportunities.

That type of interference formed the basis for this Court's

* Although who initiated such disclosure is apparently not relevant under Bishop as long as it came prior to plaintiff's termination.

holding in Velger, supra, that a probationary policeman who had been dismissed for allegedly threatening suicide was entitled to a due process hearing before final termination. The underlying reason for this Court's decision was that the probationer, in applying for a new security type position was compelled to list his former employment. By so listing, Velger precluded himself from obtaining a position, since the prospective employer was certain to contact the Police Department. If the Department revealed the reason for Velger's discharge, he was certain to be rejected for the new position. If the Department refused to release the reason for termination, then questions were certain to be raised which would also preclude Velger from obtaining the job. In short, the Court stated Velger was "between the devil and the deep blue sea".

The Supreme Court notably left undisturbed this Court's finding that Velger's liberty interest had been violated. It reversed because Velger had not alleged that the reason given for his discharge was untrue. Codd v. Velger, supra. Appellant here has repeatedly claimed that she is innocent of the charges against her.

What was present in Velger, as well as this situation, was proof that the reasons for discharge had contaminated prospective employment opportunities and were likely to do so in the future. In fact, the appellant was confronted with the incident

when she interviewed for a position with Miller Place Schools in January, 1976. (433)

In her affidavit, appellant set forth the applications for teaching positions she submitted (Exhibit M1-22, 153-254). These applications all required her to set forth her employment with the defendant District, and list her supervisor(s). Some inquired as to whether appellant had ever been denied tenure, and, if so, why?

Clearly, like Velger, Mrs. Gentile was "between the devil and the deep blue sea". Unlike Bishop, Mrs. Gentile has presented evidence that she has sought employment, has not been successful in obtaining same, and has been prejudiced in her attempt by the accusations against her which served as the sole basis for her discharge.

The Court below states that Mrs. Gentile "ignores the possibility that it was the union and not the defendants who may have publicized the removal". (Emphasis added) (457) It is respectfully urged that possibilities are not proof, and in the absence of a scintilla of evidence in this record to the contrary, the Court erroneously concluded defendants did not publicize the reasons for Mrs. Gentile's termination.

Likewise, the District Court's reliance on Paul v. Davis, 44 L.W. 4337 (1976) is misplaced. Paul sustains appellant's position. There the Court said, in discussing the parameters

of governmentally initiated stigma and Fourteenth Amendment protections:

While Roth recognized that governmental action defaming an individual in the course of declaring to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment:

The State in declining to rehire the the respondent, did not make any charge against him that might seriously damage his standing and associations in his community...

Similarly, there is no suggestion that the State, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. 408 U.S. at 573 (Emphasis supplied)

Thus, it was not thought sufficient to establish a claim under §1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. (Emphasis added)

Plaintiff has shown that she was terminated for stigmatizing (defamatory) (See complaint Exhibits I-IV) reasons and her termination is therefore actionable as violative of her Fourteenth Amendment due process rights.

One of the primary concerns expressed by the Supreme Court in Roth and Sindermann was that a dismissed public employee could be stigmatized in the community in which he lived because

of discharge. This concern went beyond the employee's opportunities to obtain future employment and involved consideration of his life in that community.

It is unnecessary to recapitulate some of the disturbing incidents Mrs. Gentile has had to face in her community since her termination. They are set forth in detail in her affidavit. However, there is no question that the reasons for her termination adversely impacted appellant's reputation in her community. In Bishop, there was no showing of such an impact, and, an examination of the reasons for petitioner's discharge in Bishop, leads to the conclusion that his reputation in the general community would not have been impaired had the reasons been publicly released. The sole prejudice in Bishop was probably to petitioner's opportunities for prospective employment.

• Mrs. Gentile resides in a small suburban community in Eastern Long Island. One cannot keep secrets in such areas. In such situations, it is imperative to afford the accused individual the chance to clear her name so that she can regain the esteem and respect of her friends and neighbors which is so vital to the quality of life in our society.

POINT II

APPELLANT WAS NOT ACCORDED DUE PROCESS OF LAW PRIOR TO FINAL TERMINATION.

The District Court found that even assuming Mrs. Gentile's

liberty interest had been violated, she was accorded the increment of due process rights to which she was constitutionally entitled. In fact, the lower Court obviously believed that this issue was the linchpin of its dismissal of appellant's liberty interest claims.

The Court below said:

Perhaps even more significant, however, is the fact that, even assuming arguendo, that plaintiff was stigmatized, she still was afforded due process in the course of her termination. The Constitution prohibits deprivation of liberty and property without "due process of law", not without an "impartial evidentiary hearing" as plaintiff contends. Due process need not stand on such a pinnacle, since "(t)he judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decision making in all circumstances." Mathews v. Eldridge, 424 U.S. 319, 348 (1976). (457)

Nonetheless, plaintiff was given notice of the charges against her afforded an opportunity to be heard. Indeed, plaintiff took advantage of every element of the due process which was available to her -- in the offices of the district principal and district superintendent, in the grievance procedures, in the state courts, and before the Board of Education. In sum, plaintiff was presented with "a meaningful opportunity to present [her] case", Mathews v. Eldridge, supra, 424 U.S. at 349, when she received timely notice of the reasons for her discharge, when she presented evidence on her behalf, and when she and her supporters were heard at an open meeting of the Board of Education. (458).

This latter holding is patently erroneous. Mathews v. Eldridge, did not, as the District Court apparently reasons,

sustain the validity of the argument that one is not entitled to a full due process evidentiary hearing when an important liberty or property interest is at stake.

The Supreme Court held in Mathews, supra, as it did in Arnett v. Kennedy, 416 U.S. 134 (1974), that a full due process evidentiary hearing was not required prior to the termination of an important benefit which was protected by a liberty or property interest as long as such a hearing was held prior to the final termination of that benefit. This factor is completely ignored by the District Court. Needless to say, Mrs. Gentile was never accorded a full due process evidentiary hearing at any time.

The Court outlined the administrative procedures available to the Social Security recipient involved in Mathews. The Supreme Court found:

If the recipient seeks reconsideration by the state agency and the determination is adverse the Social Security Act reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before a Social Security Act Administrative law judge. 20 CFR §§404.917, 404.927. The hearing is non-adversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. §404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, §404.945, and finally, may obtain judicial review 42 U.S.C. §405(g) [42 U.S.C. §405(g)]; 20 CFR §404.951.

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments.

Appellant was not accorded all of the procedural rights (or, in fact, any of those rights) available in Mathews, and, at any rate, the applicability of Mathews to this controversy is questionable, in view of the availability of a more similar case Arnett v. Kennedy, supra. In that case, the Supreme Court delineated the minimum level of due process to which a public employee protected by a liberty or property interest in his position was entitled prior to final termination.

As discussed earlier, plaintiff's liberty interests in her position entitled her to due process before she can be finally terminated. Roth v. Board of Regents, supra; Perry v. Sindermann, supra.

The United States Supreme Court set forth the minimum rights and procedures a public employee, entitled to due process protection, must receive before he is finally removed from his position in Arnett v. Kennedy, supra.

A careful reading of the Supreme Court's decision in Arnett shows that a majority of six justices confirmed that a public employee who possesses a constitutionally protected interest in his government position is entitled to a due process hearing before final termination. As noted above, plaintiff, because

of the nature of the reasons given for her termination, has a liberty interest in her position, protected by due process.

Further examination of Arnett leads to the conclusion that certain minimal procedures are mandated for these due process requirements to be met.

In Arnett Wayne Kennedy, a tenured employee in the Office of Economic Opportunity (OEO), was terminated by the regional director of the OEO subsequent to the preference of written charges against him for making false and defamatory statements about the regional and assistant regional directors.*

Under the provisions of the Lloyd-La Follette Act, 5 USC 7501, and regulations promulgated by the OEO and United States Civil Service Commission, Kennedy was entitled to receive thirty days' advance written notice of the charges preferred against him and the right to reply to his supervisor's charges orally and in writing. He also had the right to submit affidavits in support of his position and to inspect material on file in the regional office which was the basis for the allegations. This material had been annexed to the initial notice of written charges served upon him.

Kennedy elected not to respond to the charges and was, thereafter terminated. He instead brought suit in the United States District Court for the Northern District of Illinois

* An examination of the opinion leads to the conclusion that an employee with a liberty interest at stake is entitled to the same hearing procedures as one with a property interest. That was this Court's conclusion in Velger, supra and that conclusion was not disturbed by the Supreme Court.

alleging that the procedures being utilized violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. Kennedy contended that he was entitled to a trial-type hearing before an impartial hearing officer prior to his removal. (Both OEO and the Civil Service Commission regulations provided for such a hearing at the Appellate level within a reasonable period after discharge or the taking of some other form of adverse action.)

In addition, Kennedy alleged that the dismissal procedures set forth in the Lloyd-La Follette Act were unconstitutional, vague, and overbroad, while further alleging that the Act violated his Fifth Amendment rights since it failed to afford him a trial-type hearing. The Court below granted summary judgment in favor of Kennedy, concluding that the Lloyd-La Follette Act was unconstitutional, vague, and that it violated Kennedy's right to due process of law since it failed to afford him a trial-type hearing prior to his termination. The Agency appealed to the Supreme Court which reversed.

The Supreme Court's opinions, however, sustains the plaintiff's positions herein with regard to the central issues presently before this Court. The majority of the Justices concluded that a tenured employee must receive a hearing before an impartial decisionmaker and that such a hearing must include notice, a statement of the charges,

and the right to examine and cross-examine, and the right to counsel.

The right to be represented by counsel is a necessary element of due process under the Fourteenth Amendment of the United States Constitution. Goldberg v. Kelly, 397 U.S. 254 (1970). This is true even if the Court cannot precisely determine if the right to retain counsel would have altered the result or outcome of a particular hearing or proceeding. Glasser v. United States, 315 U.S. 60 (1942). Therein, the Court stated:

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge nice calculations as to the amount of prejudice arising from its denial."

Due process also requires notice detailing the reasons for proposed termination. Goldberg v. Kelly, *supra*, at 267.

Due process requires that a litigant have the fundamental right and opportunity to confront and cross-examine witnesses. Greene v. McElroy, 360 U.S. 474 (1959); Goldberg v. Kelly, *supra* at page 269. The denial of counsel and failure to provide reasons for proposed termination in advance of a hearing effectively mute this right, even if it is given in the absence of the other two rights discussed in this paragraph.

Due process also mandates that the decision-maker rely solely on the evidence adduced at the hearing to make a determination and that a decision, with reference to that

record, be given. In discussing the elements of due process, the Supreme Court in Goldberg v. Kelly, supra, at 271 noted:

" . . . the decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing (citations omitted). To demonstrate compliance with this elementary requirement the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. PUC, 260 U.S. 48, 57-59. . . (1922) though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."

In Kinsella v. Board of Education CSD #7, 378 F. Supp. 54 (1974), a three judge Court struck down certain provisions of §3020(a) of the Education Law of this State which are particularly relevant herein.

The statute provided that a tenured teacher accused of misconduct or incompetency thereunder was entitled to a hearing before a three member panel, one member to be selected by the complainant School District, one by the respondent teacher, and a third neutral member to be chosen by the other two members.

After a hearing, the panel was to make a recommendation as to the respondent's guilt or innocence of the charges as well as a recommendation as to penalty, if any. Such recommendation was not binding upon the local Board of Education which could then render its own decision. There was no requirement that the Board, in rendering such decision,

particularly if it differed from the panel's findings, set forth its reasons therefor with reference to the record. In actuality, there was no requirement that the Board render its decision in accordance with evidence adduced at the hearing.

The Court, in Kinsella, held that this procedure, on its face, was unconstitutional. The Court there found that the failure to require the Board, as the decisionmaking body, to set forth the basis for its decision with regard to the record made at the hearing, was violative of due process since a decision must rely solely on the evidence adduced at the hearing.

Due process mandates:

1) A notice of the charges against an employee with reasonable time to reply;

2) A hearing with:

- a) The right to counsel;
- b) The right to examine and cross-examine witnesses;
- c) The right to call witnesses on one's behalf;
- d) A neutral hearing officer;

3) A decision with a statement of reasons which refers to the record and evidence adduced at the hearing and based solely on that record.

In Arnett, six justices held that an impartial decision-maker is required at a hearing to terminate a public employee with a constitutionally protected interest in his position.

Justice White held:

It may be true that any hearing without an impartial hearing officer will reflect the bias of the adjudicator. The interest of the government is not so providing would be slim... it would be reasonable to expect more correct decisions... if the hearing officer is impartial." 40 L. Ed.2d at p.59.

Justice White also noted that the decisions of the Court have stressed that the right to an impartial decision-maker is required by due process. The Court has held that those with a substantial pecuniary interest in legal proceedings should not adjudicate these disputes. The Court also noted that the disqualification because of interest has been extended with equal force to administrative proceedings. Gibson v. Berryhill, 411 U.S. 564.

Justice White also referred to Pickering v. Board of Educ., 391 U.S. 563 (1968), where the Court set aside the discharge by the Board of Education of a teacher for writing a letter to a newspaper attacking the Board. Although the Court did not rule on the due process question since it was first raised there, it observed: "We do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant." (Citing Toomey v. Ohio, 40 L. Ed. 2d 58, fn. 12)

Mr. Justice Powell, in the concurring decision, and in writing for Mr. Justice Blackmun as well, in footnote 2, 40 L.

Ed. 2d 42: "In my view, the relevant fact is that an impartial decision-maker is provided at the post-removal hearing where the employee's claims are finally resolved." (Emphasis added.)

Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan concurred in dissent, stated that:

The decisions of this court compel the conclusion that a worker with a claim of entitlement to public employment absent specified cause, has a property interest protected by the due process clause, and therefore, the right to an evidentiary hearing before an impartial decision-maker prior to dismissal." 40 L. Ed.2d 75.

Therefore, six Justices agreed that an impartial decision-maker was also a necessity. (Footnote 12, 40 L. Ed.2d 69 notes that under the Federal system, impartial is defined as a single examiner who may not occupy a position directly or indirectly under the jurisdiction of the official who proposed the dismissal or who bears ultimate responsibility for that decision.

Ashe and DeWolfe found in their analysis of Arnett in Vol. 3, No. 4, Journal of Law and Education:

Another issue on which there was a majority position was the constitutional necessity for an impartial decision-maker before a teacher's discharge could finally be effected. Justice White found that an impartial hearing examiner at the pre-termination hearing was necessary and it would be fair to state that he would find the same element of procedural due process of equal constitutional necessity at the post-termination trial-type evidentiary hearing.

Justices Powell and Blackmun concluded that the Constitution required that an impartial decision-maker be 'provided at the post-removal (trial-type evidentiary) hearing where the employee's claims are finally resolved'. Justices Marshall, Brennan and Douglas also concluded that in order for the trial-type evidentiary hearing to be constitutionally meaningful, it must be before a hearing officer who is 'independent and unbiased'." at pp. 610, 611.

They concluded that:

It would appear, on the basis of these six Justices' opinion, that an impartial decision-maker is constitutionally mandated at the trial-type hearing which is accorded to the employee prior to being finally discharged.

The defendants not only failed to accord appellant an evidentiary hearing, they did not even provide her with any of the pre-termination procedural rights in Arnett.

The Court below held that Mrs. Genrile's meetings with Wallen, Hines, and the Board afforded her a sufficient due process opportunity to respond to the charges against her.

This Court is respectfully referred to Mrs. Gentile's uncontradicted accounts of her two meetings with Wallen. (at 20-24) They could not be characterized as fact finding investigations in any sense of the word. Wallen was clearly interested in berating appellant, and anything that she had to say, and in fact did say, on her own behalf fell on deaf ears.

Mrs. Gentile's meeting with Hines was no better. Hines

appeared to be bound to support Wallen's position and did not exhibit any serious attempt to examine the validity of the allegations against Mrs. Gentile. (29)

Nor did appellant's meeting with the Board of Education provide her with a reasonable opportunity to present her position. The uncontradicted affidavit of Mrs. Gentile reveals that the Board members had long before prejudged the matter, based on Wallen's claims to them, and that they were bound to adhere to that position because of the pending disciplinary litigation against the principal Johnson. (Gentile affidavit paras. 46, 47, 51, (29-31)). Gentile Supplemental affidavit para. 7-8 (432)).

Mrs. Gentile was never confronted with formal charges, exhibits, and supporting affidavits against her. She was never permitted to confront her accusers in an adversary proceeding. The procedures accorded her did not meet those required in a dismissal of this nature.

Defendants argued below, and the District Court apparently agreed, that appellant was attacking the constitutionality of §3031 of the Education Law, which provides for so-called fair dismissal procedures for probationary teachers. Appellant has not launched such an attack.

Appellant's claim is that those procedures are only deficient in a controversy where a probationer's liberty interest is at stake, such as here. Then, a full evidentiary hearing is required at some stage of the proceeding.

POINT III

PLAINTIFF HAD A PROPERTY INTEREST IN
HER EMPLOYMENT.

Plaintiff, at the time of her termination, had a property interest in her continued employment pursuant to §§3012 and 3020(a) of the Education Law and was therefore entitled to a due process hearing prior to final termination. Roth, supra.

Plaintiff was wrongfully denied a maternity leave in 1970 to care for an adopted baby. When the bridge of a leave is considered, plaintiff is a tenured employee.

Moreover, the collective bargaining agreement contains clauses which indicate that plaintiff is entitled to tenure status (or at least at one year's further employment). Plaintiff was entitled to a hearing before she could have been deprived of this contractual property right.

Defendants cited as authority for their position that the collective bargaining agreement's provisions did not confer upon appellant any expectancy for future employment in the defendant school district, the stay of arbitration which had been granted to the Board of Education against appellant's Association.

The Association had filed a grievance which alleged, inter alia, that appellant was a tenured employee because of certain early notice provisions mandated in the collective bargaining agreement (62-63, paras. 102-109). Supreme Court, Suffolk

County had stayed the arbitration because the clause was void and unenforceable. The Appellate Division, Second Department affirmed. This was noted in the lower court's decision. (452).

The Appellant's union has moved the Appellate Division for leave to appeal to the Court of Appeals of the State of New York. Should the Appellate Division refuse to grant that application, it will be renewed before the State Court of Appeals itself.

The recent decisions of the State's highest Courts indicates that appellant could be reinstated for an additional probationary year with full back pay and benefits for a procedural violation of her contractual rights. Board of Education v. Chhattauqua Teachers Association, 41 App. Div. 2d 47; Board of Education v. Bellmore-Merrick United Secondary Teachers, 39 N.Y.2d 167; Matter of Fayetteville-Manlius Central School District, 51 App. Div.2d 91 rev'd on the dissent of Goldman, J., __ N.Y.2d __ (1977).

Appellant then arguably has some property interest in her position, albeit a limited one.

Additionally, Mrs. Gentile claims that she was a tenured employee. After two years of probationary service, Mrs. Gentile sought a maternity leave to care for a newly adopted baby. Defendants denied her that leave because her child was not natural-born. Subsequently, Mrs. Gentile was reemployed in 1972.

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At the time of her dismissal, she would have had tenure were it not for defendants' unlawful denial of her application for maternity leave. Appellant contends that denial was deprived her of equal protection of the law and that she was entitled to a judicial declaration of her tenured status by the Court below.

The Court rejected appellant's argument. It said that it was too late for Mrs. Gentile to raise this issue and that she should have raised it in 1970 or 1972.

The defendants below disclaimed individual liability because there was no case in 1970 on point declaring that employer discrimination in the granting of post birth maternity or child-care leave to mothers of natural born children and the denying of such leave to mothers of newly born adopted children is unconstitutional.*

Defendants alleged that a judicial declaration of unconstitutionality is required before they can be adjudged to have run afoul of the limited immunity in Wood v. Strickland, 420 U.S. 308 (1975). Ipsa facto, not being individually liable, the appellant's cause of action must be dismissed.

The cases cited by defendants for that federal proposition do not create such a sweeping rule, but rather, apply to the fact that individual liability should not attach in forced

* Defendants have the power to refuse or grant leaves pursuant to §1709 of the Education Law.

maternity leave cases in light of earlier court decisions which could have lead the individual defendants in those cases to reasonably conclude that forced maternity leaves, prior to giving birth, were constitutional.

Plaintiffs pointed out that defendants were aware of the constitution, the laws of the nation and the state, as they define public policy, and the fact that discrimination or classification grounded in sex is suspect.* Interestingly enough defendants did not challenge plaintiff's claim that they denied her equal protection of the laws when they refused her a maternity leave to care for her adopted baby, but instead sought to escape liability on purely procedural grounds.**

Defendants cannot meet the burden of reasonableness or rationality in distinguishing between plaintiff and mothers of natural born babies.

Merely because defendants may not have been individually liable is not sufficient to conclude that appellant's cause of action on this ground should be dismissed. Yet that is what the Court below did. (450, 451)

Nor was appellant barred from pursuing a remedy as to her status. When appellant sought to return to her position with defendants she was reemployed and compensated on the salary

* §31 Domestic Re. Law, §2.10 Estates, Powers, & Trusts Law, 42 U.S.C. §2000e-2a; 29 CFR §1604(b), also Hutcheson v. Lake Oswego School District, 519 F.2d 961 at 965 fn. 3 (1975).

** Defendants had contracted with the Port Jefferson Station Teachers Association to provide for "maternity" leave but claimed that plaintiff was not eligible as the mother of an adopted baby.

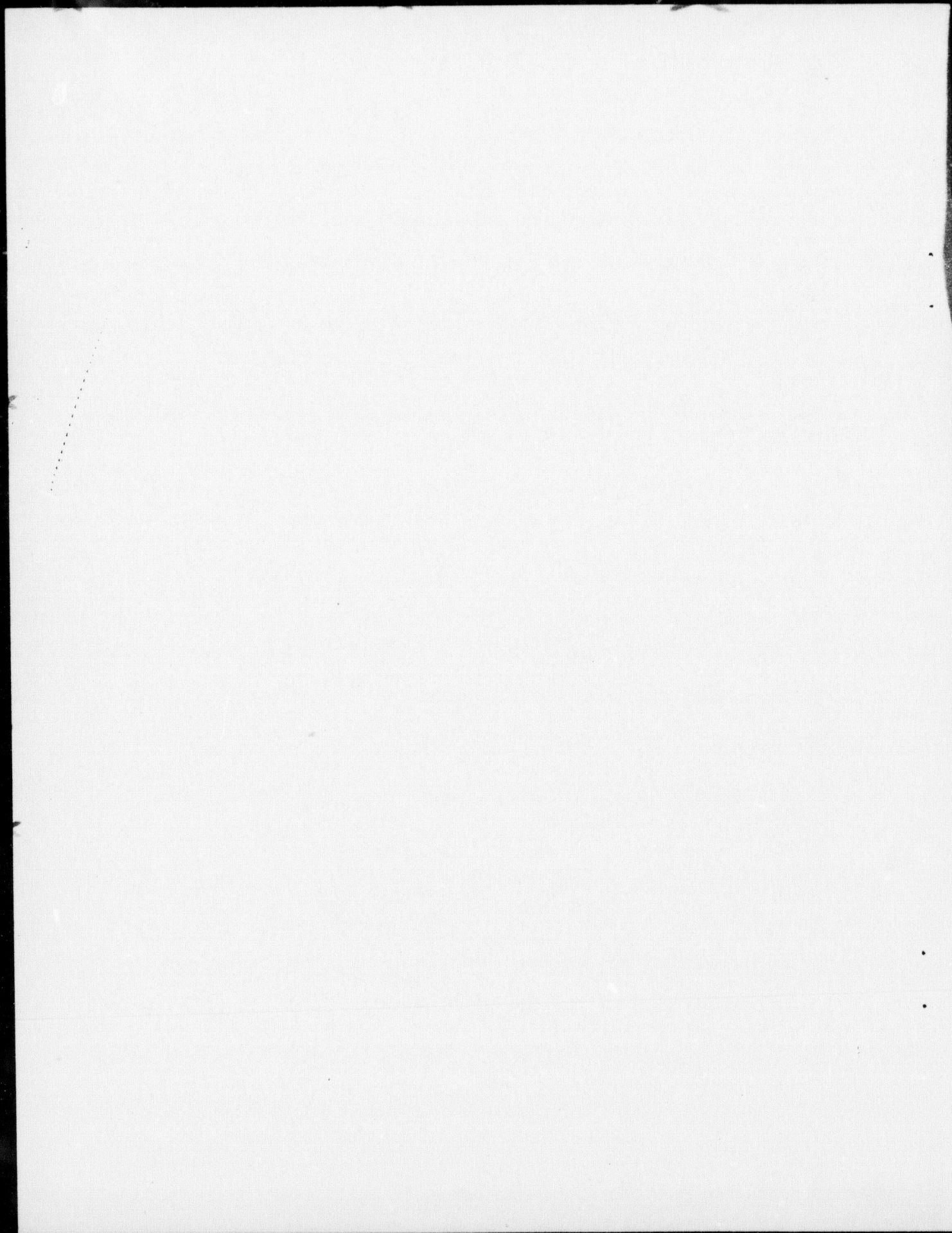
schedule for her years of service in the district. (435 paras. 19, 20) In short, Mrs. Gentile was not prejudiced by defendants' refusal to grant her maternity leave until her termination without a due process hearing in July, 1975. That is when her cause of action accrued. Had she commenced litigation prior to that date, she would have been premature since she had not suffered any damage as a result of defendant's actions.

POINT IV

PLAINTIFF WAS ENTITLED TO A PRELIMINARY INJUNCTION.

(a) Irreparable Harm Not Required

Where an alleged deprivation of a constitutional right is involved, no showing of irreparable harm is necessary to justify the issuance of preliminary relief. Keefe v. Geanohas, 418 F.2d 359 (First Cir., 1969); Henry v. Greenville Airport Comm., 284 F.2d 631, 633 (4th Cir., 1960); Brass v. Hoberman, 295 F. Supp. 358, 361 (D.C.N.Y., 1968). Plaintiff alleges that defendants here violated, inter alia, her liberty interest when they terminated her without a due process hearing. Plaintiff contends that such a hearing was required because she was terminated based on charges that she had colluded with a principal in the District to falsify her observation reports. Plaintiff's affidavit presents clear evidence that this termi-



nation has cast and continues to case a stigma upon her both in the general community and in the community of her chosen profession - the educational community.

Therefore, plaintiff need show only that she has a probability of success on the merits.

(b) Probability of Success

It is now well settled that a public employee may not be terminated without a due process hearing where the reasons or the events surrounding that termination cast a stigma upon him which violates his liberty interest, which is protected by the Fourteenth Amendment to the United States Constitution. Board of Regents v. Roth, 408 U.S. 564 (1971); Perry v. Sinderman, 408 U.S. 593 (1972); Lombard v. Board of Education, 502 F.2d 631.

Plaintiff's affidavit shows that the defendants terminated her because of allegations that she colluded or conspired with the principal of her school to falsify his observations and evaluations of her. Evidence annexed to the affidavit further shows that defendants discussed these allegations against plaintiff with each other, relied upon it in deciding to terminate her, based their termination of her principal Johnson on these accusations, and disseminated these same contentions to the news media and, hence, throughout the community.

The Court of Appeals in this Circuit held that a probationary policeman who was discharged because his personnel

records suggested he had attempted suicide was entitled to a due process hearing "before a dismissal can be effective", Velger v. Cawley, 525 F.2d 334 (1976); rev'd on other grounds __U.S. __ (1977).

Here defendants have not only discharged plaintiff on grounds which even some of them admit involve charges of criminal conspiracy, collusion, and professional misconduct, but they have publicized these allegations in the press as well as communicated them to other government agencies, such as the New York State Department of Labor, Division of Employment.

Plaintiff was clearly entitled to a due process hearing and is practically assured of success on the merits.

(c) Plaintiff Meets the Two Other
Standards for Preliminary Relief
in this Circuit

The two standards in this Circuit for the granting of preliminary relief are: (a) whether plaintiff has demonstrated a combination of probable success on the merits and the possibility of irreparable harm; or (b) whether plaintiff has raised serious questions going to the merits and the balance of hardship tips decidedly in her favor. Pride v. Community School Board School of Brooklyn District #18, 482 F.2d 257, 264 (2nd Cir., 1972); Stark v. N.Y. Stock Exchange, 466 F.2d 743, 744 (2nd Cir., 1972); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2nd Cir., 1969), cert. denied 39 U.S. 999 (1969).

As noted above, plaintiff has shown clear probability of success on the merits and therefore meets the less stringent test of raising serious questions going to the merits.

(d) Irreparable Harm

Plaintiff is precluded from pursuing her chosen profession in the geographic vicinity because of defendants' outrageous negligence and/or malice in permitting the dissemination of the reasons for her discharge. These accusations can conceivably preclude plaintiff from obtaining any employment, much less employment in her chosen field.

Moreover, as noted in plaintiff's affidavit, she and her family have been subjected and continue to be subjected to public humiliation because defendants have lodged serious charges against her and have not permitted her to confront her accusers at a due process hearing.

(e) Balancing of the Hardships

When the hardship to plaintiff is weighed against the public interest against the granting of interim relief, the balance tips sharply in plaintiff's favor.

Plaintiff was not terminated for incompetency nor has any charge been made, even by defendants, that plaintiff will somehow harm the children of the District. The defendants' conduct in employing and reemploying plaintiff over a period of nine years clearly demonstrates their confidence in her pro-

fessional competence.

Plaintiff, on the other hand, has been humiliated and foreclosed from pursuing her profession.

Moreover, defendants have an option. Tenured employees charged with misconduct pursuant to §3020-a of the Education Law may be continued in their position, assigned non-classroom duties, or be suspended with pay, pending a hearing.

It is submitted that defendants have such an option and it is further urged that preliminary relief is appropriate in a matter involving the breach of an employee's liberty interest by imposing a stigma upon him. (See Hilton v. Anker, 75 Civ. 4181 (SDNY, 1975)).

POINT V

THE UNITED STATES COURTS HAVE SUBJECT
MATTER JURISDICTION TO ENTERTAIN ALL
CLAIMS AGAINST DEFENDANTS.

42 U.S.C. 1983

It is anticipated defendants will again raise the issue of subject matter jurisdiction. Defendants relied on Monell v. Department of Social Services, 532 F.2d 259 to substantiate their contention that this Court lacks subject matter jurisdiction over the instant dispute.

Plaintiff has proceeded against individual defendants individually, unlike Monell. Moreover, in Monell, supra, the Court stated:

There is no claim for reinstatement here. The claim for back pay is not merely an adjunct of equitable relief. It stands simply as a claim for damages... at 267.

Mrs. Gentile is suing for equitable relief and her damages claim is incidental to such relief. Thus, even had plaintiff not proceeded against defendants individually, a claim under 42 U.S.C. 1983 would lie since damages are sought incidental to equitable relief (See also footnote P. 6 in Turano v. Board of Education, (Appendix A annexed hereto).

Plaintiff permissibly seeks damages against defendant Board and individual defendants pursuant to the Fourteenth Amendment and 28 U.S.C. 1331(a).. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); City of Kenosha v. Bruno, 412 U.S. 388 (1971) Justices Marshall and Brennan concurring; Dellinger, Of Rights and Remedies: The Court as a Sword, 85 Harv. L. Rev. 1532, 1558 (1972). See also Home Telephone and Telegraph v. City of Los Angeles 227 U.S. 278 (1913); Ex Parte Young, 209 U.S. 123 (1908); Hanna v. Drobnick, 514 F 2d 393 (6th Cir., 1975); Roane v. Callisburg Independent S. D. 511 F 2d 633 (5th Cir., 1975); Muskegan Theaters Inc., 507 F 2d 199; Foster v. City of Detroit, 405 F 2d 138 (6th Cir., 1968); Miller v. County of Los Angeles, 341 F 2d 964 (9th Cir., 1965); Foster v. Herly, 330 F 2d 87 (5th Cir., 1964); Lowe v. Manhattan Beach City

School District, 222 F 2d 258 (9th Cir., 1955); Dahl v. City of Palo Alto, 372 F. Supp. (N.D. Cal., 1974); Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973); Madison Realty Co. v. City of Detroit, 315 F. Supp 367 (E.D. Mich., 1970); Haczela v. City of Bridgeport, 229 F. Supp. 709 (D. Conn. 1969); Brault v. Town of Milton, 572 F 2d 730 (2d Cir., 1975); Bell v. Hood, 327 U.S. 678, 681-84 (1946); Matherson v. Long Island State Park Commission, 442 F.2d 566, 568 (2d Cir. 1971); Tron v. Condello, et al., 76 Civ. 567 (SDNY dec. Dec. 23, 1976); Patterson v. Ramsey, 413 F. Supp. 523, 528 (D. Md. 1976).

The Court is also respectfully referred to Turano v. Board of Education, supra.

We note finally that the controversy [about 28 U.S.C. 1331(a) and the 14th Amendment] does not affect plaintiff's claims for equitable relief under the Fourteenth Amendment, including his claims for reinstatement nunc pro tunc to his teaching position. (Emphasis added)

CONCLUSION

THE DECISION BELOW TO DISMISS SHOULD BE REVERSED AND
APPELLANT'S MOTION BELOW FOR PRELIMINARY RELIEF SHOULD BE
GRANTED IN ALL RESPECTS.

Dated: New York, N.Y.
April 27, 1977.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -x

JOHN TURANO,

Plaintiff,

75 C 606

-against-

SUPPLEMENTAL
OPINION AND ORDER

BOARD OF EDUCATION OF ISLAND TREES
UNION FREE SCHOOL DISTRICT NO. 26, and
RICHARD AHRENS, WILLIAM RICHTER,
JOHN LIEERATORE, FRANK MARTIN,
RICHARD MELCHERS, JOHN LIVELY, and
CHRISTINE FASULLO, individually and
as members of the Board of Education
of Island Trees Union Free School
District No. 26,

March 30 , 1976

Defendants.

- - - - -x

PLATT, D.J.

On January 30, 1976, this Court denied a motion for summary judgment brought by defendants pursuant to Rule 56 of the Rules of Civil Procedure, and a cross-motion for summary judgment brought by plaintiff.

At pages 9-10 of the Opinion and Order denying the motions, the Court indicated that plaintiff would be entitled to recover from defendants if he could demonstrate that he actually suffered damages as a result of belated notice of termination of employment, which notice constituted a "property right" under his union contract. It was thought that even if

APPENDIX A

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jurisdiction for such a claim could not be founded upon 42 U.S.C. § 1983 and 28 U.S.C. § 1343, it might well be based directly upon the Fourteenth Amendment and 28 U.S.C. § 1331. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan and Marshall, J.J., concurring); Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975); Fine v. City of New York, ___ F.2d ___ (2d Cir. Dec. 31, 1975), slip op. 1413; Buck v. Board of Education of the City of New York, 71 Civ. 954 (E.D.N.Y. July 16, 1975); Lombard v. Board of Education of the City of New York, ___ F.Supp. ___, 72 Civ. 344 (E.D.N.Y. Jan. 23, 1976).

On March 8, 1976, the Court of Appeals issued an opinion in Monell v. Department of Social Services of the City of New York, ___ F.2d ___ (2d Cir. March 8, 1976), slip op. 2409. That opinion held, in relevant part:

1) that the Board of Education of the City of New York is not a "person" within the meaning of 42 U.S.C. § 1983; and

2) that employees of a municipality may not be sued in their official capacities in an action for damages brought under § 1983.

The reasons^{1/} given by Judge Gurfein in his opinion for the Court also suggested that the rationale of Bivens v.

^{1/} See Appendix

Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971), should not be construed to allow suits
for damages to be brought directly under the Fourteenth
Amendment. The fashioning by courts of damage remedies
for violations of constitutional rights, said the Supreme Court
in Bivens, is not required by the Constitution, but merely
permitted when all circumstances indicate that such remedies
are appropriate. While considering the creation of damage
remedies for Fourth Amendment violations, the Supreme Court
noted the absence of an

"explicit congressional declaration that persons
injured by a federal officer's violation of the
Fourth Amendment may not recover money damages
from the agents, but must instead be remitted to
another remedy, equally effective in the view of
Congress". Bivens v. Six Unknown Named Agents
of Federal Bureau of Narcotics, supra, at p. 397.

But Monell, especially at pp. 2421-22,* emphasized that such
a congressional statement as to the inappropriateness of damage
remedies against municipal bodies--and their employees in
their official capacities--does exist, in the form of § 1983.

The end result is that no jurisdictional basis for
a claim against defendant Board of Education** or its employees
in their official capacities appears to exist under 42 U.S.C.
§ 1983 and 28 U.S.C. § 1343, and that the existence of such

* But see also p. 2425.

** The holding of Monell is probably that no school board
is a "person" for § 1983 purposes, although attributes
peculiar to the Board for the City of New York may have
figured in the Court's ruling.

a basis under the Fourteenth Amendment and 28 U.S.C. § 1331 is to say the least very doubtful.***

While the caption in this case indicates that the members of the Board of Education are sued "individually and as members of the Board," it is not now clear that the complaint sufficiently alleges actions by Board members "outside the scope of their offices", or arbitrary or malicious actions by them, in such a way as to state a claim against the members in their individual capacities; see Monell v. Department of Social Services of the City of New York, supra, at p. 2420.

In its Opinion and Order of January 30, 1976, after the Court indicated that plaintiff was entitled to recover damages because of the belated notice of termination given to him, it continued by characterizing such belated notice as a deprivation of a property right of which plaintiff was possessed by reason of the guarantees of the Teachers Association's contract. Defendants have since indicated that they object to, and wish to appeal from, this characterization.

Although now, as indicated above, the Court has substantial doubts whether plaintiff can maintain an action for money damages under either 42 U.S.C. § 1983 or the Fourteenth Amendment, this Court will not certify that question to the

*** No occasion has yet arisen for the Court to consider the implications for this case of the \$10,000 amount-in-controversy requirement of § 1331.

Court of Appeals because that question does not need to be resolved in this case at this time. It appears that plaintiff could in any event recover damages in a common law action for breach of contract. This Court is, of course, able under circumstances such as those present in this case to exercise pendent jurisdiction over such claims, United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). As it stands, plaintiff's complaint does not properly set forth such a common law claim, but plaintiff may if he wishes to do so within 20 days from the date of this order amend his pleadings so as to state such a claim.

In consequence of the considerable uncertainty remaining in this Circuit after Monell as to whether an action for damages will lie against a Board of Education and its members under the Fourteenth Amendment and 28 U.S.C. § 1331, and in light of this Court's decision to exercise pendent jurisdiction over any forthcoming state law contract claim, the Court now supplements its Opinion and Order of January 30, 1976, so as to indicate

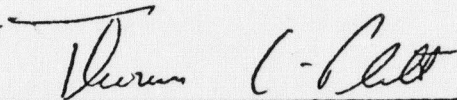
1) that the Opinion and Order of January 30, 1976 should not be construed as a resolution of the Fourteenth Amendment questions discussed above; and

2) that since in any event preparations for trial on plaintiff's other claims must go forward, and since plaintiff apparently may recover damages, if any, suffered as a result of the belated notification of termination in a pendent common law action for breach of contract, the Court will at this time take no position on whether an

action for damages may be brought directly under the Fourteenth Amendment or on whether such belated notification constitutes, in light of the provisions of the Teachers Association contract, a deprivation of property within the meaning of the Fourteenth Amendment.

We note finally that the controversy does not affect plaintiff's claims for equitable relief under the Fourteenth Amendment, including his claims for reinstatement nunc pro tunc to his teaching position.* Monell did not of course attempt to override the long lines of cases, following Ex parte Young, 209 U.S. 123 (1908), which approve affording equitable relief in actions brought directly under constitutional provisions.

SO ORDERED.

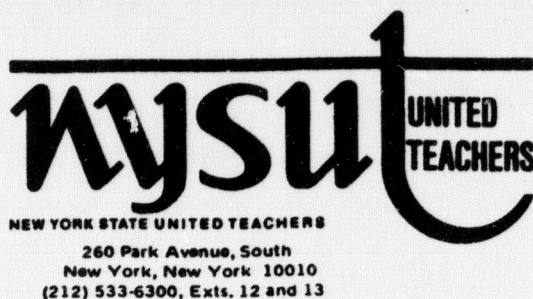


U.S.D.J.

* Whereas a back pay claim standing alone was equated with damages in Monell, the Court at p. 2426 explicitly distinguished that case from one in which reinstatement is also sought; see also Flores v. Local 25, International Brotherhood of Electrical Workers, AFL-CIO, F.Supp. _____, 74 Civ. 284 (E.D.N.Y. Feb. 9, 1976), and cases there cited.

The Court also notes that the very recent Supreme Court case of Paul v. Davis, U.S. _____, 44 USLW 4337 (March 23, 1976) does not appear to impair the Court's Opinion and Order dated January 30, 1976 wherein it was held that the imposition of a stigma in the course of a non-renewal of a probationary teacher's contract may constitute a deprivation of liberty under 42 U.S.C. § 1983 and the Fourteenth Amendment. (See 44 USLW at pp. 4340, et seq.)

General Counsel
New York City Office,
James R. Sandner



11 May 1977

Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York NY 10007

Attn: Mr. Colman

Re: Gentile v. Wallen, et al.
Docket No. 77-7093

Dear Sir:

Enclosed please find an original and 24 copies of appellant's brief together with an affidavit of service of three copies on the attorney for appellees. The requisite number of copies of the Appendix have already been delivered to you. Please file the brief and appendix before May 16, 1977. Please note that I will be in Italy between June 22 and July 15, 1977 on my honeymoon and cannot argue during that period.

Thank you for your cooperation herein.

Very truly yours,

David N. Stein
Associate Counsel

dns/cmp

enclosures

cc: Hull, Block & Grundfast, Esqs.
Attorneys for Appellees

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Affiliated with the American Federation of Teachers, AFL-CIO

